March 16, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Environmental Defense Institute

Date of Filing: October 24, 2005

Case Number: TFA-0128

On October 24, 2005, Environmental Defense Institute (the Appellant) filed an Appeal from a final determination that the Idaho Operations Office (Idaho) of the Department of Energy (DOE) issued on September 14, 2005. In the determination, Idaho released numerous documents to the Appellant responsive to the Appellant's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Idaho did withhold portions of one document under Exemption 2 of the FOIA. This Appeal, if granted, would require Idaho to release the information it withheld from that document.

I. BACKGROUND

In a letter dated July 7, 2005, the Appellant submitted a FOIA request to Idaho for documents relating to the Advanced Test Reactor (ATR) and other facilities at the Reactor Technologies Complex (RTC). Request Letter dated July 7, 2005, from Chuck Broscious, Executive Director, Appellant, to FOIA Office, Idaho. Because the initial request was so broad, the Appellant was invited to narrow its request, which it did on July 28, 2005. On September 14, 2005, Idaho issued a determination on the matter. Idaho released all but two documents in full. Of the remaining two documents, one was withheld in its entirety. The second was redacted under Exemption 2 of the FOIA. This second document is at issue in this Appeal.[1/]

On October 14, 2005, the Appellant filed an Appeal of the September 14, 2005 Determination with the Office of Hearings and Appeals (OHA) of the DOE. In its Appeal, the Appellant questions the correctness of the Idaho exemption determination regarding the second document, entitled ATR Safety Analysis Report (SAR). The Appellant argues that Idaho has failed to reasonably segregate the information in the ATR SAR. Appeal Letter dated October 14, 2005, from Chuck Broscious to Director, OHA, at 2.

[1/] After this Appeal was filed, the first document was released to the Appellant.

II. ANALYSIS

Idaho withheld portions of the ATR SAR under FOIA Exemption 2. The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Only the application of Exemption 2 is at issue in the present case.

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB,* 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

Idaho's Determination Letter indicates that it withheld portions of the ATR SAR because the information is "integral to describing potential vulnerabilities of the reactor and related systems, and the methods and measures taken to prevent or mitigate those potential problems." September 14, 2005 Determination Letter. Therefore, the release of this information could be used to identify those potential vulnerabilities and to understand how to thwart the protective and mitigative measures currently in place. Specifically, the information withheld by Idaho under Exemption 2 consists of maps, diagrams, and safety reports regarding the Advanced Test Reactor.

The information withheld is clearly predominantly internal in nature. The D.C. Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, it is predominantly internal.

The information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d 530-31.

Release of the information at issue in the present case could allow malefactors to identify vulnerabilities of the ATR and to understand how to thwart the protective measures currently in place. Accordingly, disclosure of the information at issue risks allowing malefactors to circumvent DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. Although it is obvious that this Appellant has no such intentions, if DOE were to release this document to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. Therefore, because of the hazards involved in public release, we find that the information was properly withheld under the "high two" prong of Exemption 2.

The Appellant also contends that the FOIA mandates that any reasonably segregable portion of a record must be disclosed to a requestor after the redaction of the parts which are exempt. October 14, 2005 Appeal Letter at 2. We agree. We have reviewed the ATR SAR which Idaho released to the Appellant with redactions. We believe that chapter 3/4, pages 0-1 and 0-2 of the ATR SAR could be reasonably segregated and released to the Appellant. We will remand the matter to Idaho for review of those pages and issuance of a new determination either releasing the information or justifying its withholding.

III. CONCLUSION

Idaho properly withheld the redacted material, except as outlined above, under the "high two" prong of Exemption 2. Therefore, this part of the Appeal will be denied. We will remand the matter to Idaho so that it can review two pages of the withheld document and issue a new determination.

It Is Therefore Ordered That:

(1) The Appeal filed by Environmental Defense Institute on October 24, 2005, Case No. TFA-0128, is hereby denied, except insofar as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Idaho Operations Office which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 16, 2006